Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-823

BEN R. DRAKE and JENNY DRAKE,
husband and wife, *Petitioners.*

v.

UNITED STATES OF AMERICA and
CURTIS G. GUILES, Special Agent,
Internal Revenue Service, *Respondents,*
and

O'BRIEN, SIMMONS & COMPANY, *Respondent,*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA and
CURTIS G. GUILES, Special Agent,
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The Petitioner, Ben R. Drake and Jenny Drake, husband and wife, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on the 21st day of August, 1978.

OPINION BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Idaho. A copy of the Order of the Court is attached in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 21, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court in the enforcement of a summons pursuant to Sec. 7402(b) and 7604(a) of the Internal Revenue Code of 1974, 26 U.S.C. Sec. 7402(b) and 7604(a) can refuse argument or evidence by the taxpayer who has intervened in the show cause proceedings to prevent enforcement of a summons for records and documents of the taxpayer in the hands of a third party.

2. Whether an appellant can be denied their right of appeal by declaring matters to be moot where the District Court or Circuit Court refuses to stay the seizure of a taxpayers record from third parties pursuant to the enforcement of a summons as provided in Sec. 7402(b) and 7604(a) of the Internal Revenue Code of 1974, 26 U.S.C. Sec. 7402(b) and 7604(a), especially where the taxpayer raises issue of court interference in the testimony and refusal

to allow argument or presentation of evidence, and failure to consider the issuance of a summons for criminal purposes and not civil; and, lastly, the failure to enforce the summons which freezed the records of the taxpayer.

3. Whether the enforcement of a summons against third parties for a taxpayers records which is not the summons which caused the seizure of the records is valid exercise of said statutes and of the 5th amendment of the Constitution of the United States providing that the property of a person shall not be taken except by due process of law.

4. Whether an unenforced summons pursuant to the Sec. 7402(b) and 7604(a) of the Internal Revenue Code of 1974, 26 U.S.C. Sec. 7402(b) and 7604(a) may be used to freeze the records of the taxpayer in the hands of third persons so that the taxpayer may not retrieve them and thereafter be turned over by or pursuant to an order of the court in the enforcement of another summons.

5. Whether the taxpayer can prevent the enforcement of a summons for records in the hands of a third party when the government establishes only the personal motives of the agent for the Internal Revenue Service in seeking those records for an alledged civil purpose against the taxpayer's claim that is really for a criminal purpose.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

§ *7402. Jurisdiction of District Courts*

"b) To Enforce Summons. — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

United States Code, Title 26:

§ *7604. Enforcement of Summons*

"(a) Jurisdiction of District Court. — If any person is summoned under the internal revenue law to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

United States Constitution, Amendment 5:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Code, Title 28

§ *1291.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

This is a tax case relating to the enforcement of a summons affecting a husband-wife taxpayer (Intervenors and Appellants) and issued to obtain records of an accountant, O'Brien, Simmons & Company, Respondents. The Court issued a subpoena against the records over the objection of the taxpayer.

On February 3, 1978, the U.S. District Court, before the Honorable Ray McNichols heard testimony of one Curtis G. Guiles, a special agent with the Internal Revenue Service.

The Respondent, O'Brien, Simmons and Company offered no evidence. Cross-examination of Guiles showed that the government was basing its actions upon Affidavit and Petition for a Summons dated October 25, 1977 directed against the taxpayers-intervenors. Another set of Summons were issued earlier to O'Brien, Simmons and Company dated October 6, 1977. That Summons was not being enforced in these proceedings although the records now being sought were held pursuant to this first unenforced summons.

The Internal Revenue Service requested records for the tax years of 1974, 1975 and 1976 although the year 1976 is the tax year in question. The agent admitted that he had repeatedly refused to disclose the nature of the records request for the prior years. He further demanded all the records for the years 1974 and 1975 but testified that he wanted to know about a real estate development and sales relating thereto.

The agent further testified that he wanted to determine whether there was a tax return due and whether to prosecute criminally. A tax return was filed containing reference to the Fifth Amendment of the United States Constitution asking the Internal Revenue Service to show the taxpayer how to prepare a tax return that would not jeopardize his Fifth Amendment rights of self-incrimination. The taxpayer had requested immunity from criminal prosecution for any errors created by the Respondent, O'Brien, Simmons & Company, in preparation of the returns, and that the taxpayer was willing to grant access to tax information. The agent finally admitted that was true.

Criminal prosecution had been discussed with the supervisor of the agent.

At this point the Court commenced asking leading questions of the agent. The agent testified that the subpoena was not a guise for criminal prosecution had been commenced. The information was initially to determine whether or not there were civil taxes due.

The witness upon further examination admitted that he was informed taxes were due although in the Court questioning, he said he did not know they were due or that there was a duty to file a return. He further said that an estimate of taxes due had been filed and $4,600 to $4,700 had been paid towards the taxes and that in fact, he did know a return was required to be filed and the probable amount of tax due.

Thereupon, the witness's testimony was completed and the Court ruled in favor of the government without argument or submission of proof from the Intervenors-Appellants. The Appellant presented a motion to stay execution of the order of the court granted at the conclusion of the case but that order was denied. Thereafter without opinion, the Circuit Court granted the Respondent United States Government's motion to dismiss the appeal on the grounds of mootness.

REASONS FOR GRANTING THE WRIT

1. That the Circuit Court has decided the importance of the question in a way in conflict from the accepted and usual course of Judicial Proceedings.

I.

The thrust of the petitioner's arguments stem from permitting a dismissal of an appeal on the grounds of mootness. Here the petitioner's tax records, which were in the hands of a third person, were turned over to the Internal Revenue Service after the District Court had refused to grant the stay of execution of the Order.

The statutes, rules and procedures have always been to allow review of lower court proceedings. The old adage of "a man is entitled to his day in Court" is a fundamental being

denied by the procedures used below. Although the statutes of the United States permit appeal from a District Court to a Circuit Court, this route is being circumvented, especially in the taxpayer-summons cases before the lower courts.

Presently, the system is to require a stay of execution from the court which ruled adversely to your petitioner. If the stay is not granted and the papers are turned over then the Circuit Court rules that the matter is now moot as the papers and documents are in the hands of the Internal Revenue Service. The question then becomes: Should the taxpayer's right of appeal be defeated by the turning over of documents to the Internal Revenue Service. Since the government has the power of compulsion over third persons and the taxpayer is unable to prevent its exercise, appeal rights would become destroyed every time the District Court or the Circuit Court refused to stay during the course of the appeal process. Appeals should not be decided by stay orders, but by the merits of the case. Mootness occurs when there is nothing further for the Court to act upon, rendering the jurisdiction of the Court incomplete. These principles are best set forth in the case of *Uyeda vs. Brooks,* 348 F2d 7633 6th Circuit (1965).

In this case the plaintiff sued to dismiss the defendants appeal. The defendant, NLRB Director, had certified a collective bargaining unit but the District Court ruled that the certification had to be cancelled. The director pursuant to the Court Order, revoked the certification of the Union. The plaintiff's attempt to dismiss the appeal was denied even though there was voluntary compliance of the Court Order the Court said:

> It is readily apparent that this is not a case where a decision by this court on the appeal "cannot affect the rights of the litigants," St. Pierre v. United States, 319 U.S. 41, 42, 63 S.Ct. 910, 911, 87 L.Ed. 1199; or where there remain an "actual matters in controversy essential to the decision of the particular case" before us. Local

No. 8-6 Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri, 361 U.S. 363, 367, 80 S.Ct. 391, 4 L.Ed.2d 373; United States v. Alaska S. S. Co., 353 U.S. 113, 115-116, 40 S.Ct. 448, 64 L.Ed. 808.

"An appeal is not moot if the controversy has not ceased to exist." 13 Encyclopedia of Federal Practice, Sec. 63.90 308 (3rd ed. 1952); cf. Liner v. Jafco, Inc., 375 U.S. 301, 84 S. Ct. 391, 11 L. Ed. 2d 347; Pacific Coast Assn. of Pulp and Paper Manufacturers v. National Labor Relations Board , 304 F.2d 30 (C.A. 10), cert. denied, 366 U.S. 918, 81 S. Ct. 1093, 6 L. Ed. 2d 240; Leader Clothing Company v. Fidelity & Casualty Co., 227 F. 2d 574 (C.A. 10). Thus a defeated party's compliance with a district court ruling does not bar him from appealing unless his compliance has made it impossible for the appellate court to grant effective relief. This is true even if the affected party has failed to avail himself of an opportunity to obtain a stay of the proceedings or a sepersedeas." See Dakota County v. Glidden, 113 U.S. 222 5 S.Ct. 428, 28 L.Ed. 981; Annotation, 39 A.L.R.2d 153.

We hold that the cases relied upon by the plaintiff, such as Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293, and Meyers v. Chessman, 174 F. 783 (C.A.6) is not controlling. These cases stand for the proposition that a case becomes moot and appeal is precluded when an act occurs which renders it impossible for the appellate court "to grant * * * any effectual relief whatever," 159 U.S. at 653, 16 S.Ct., at p.133; or, as this Court has stated, an appeal should be dismissed where there is "no practical method of undoing that which has been done". 174 F. at 786.

However, it is interesting to note that a review of the cases in the Circuit Courts dealing with mootness, the principles tend to be different where tax cases are involved. See, for example *Kurschan v. Riley,* 484 F2d 952 4th Circuit, and *U.S. v. Lyon,* 442 F2d 1144 1st Circuit (1971). In a more recent case of *Barney v. U.S.,* 568 F2d 116 (1978) where a bank had turned over papers of the taxpayer, it was ruled that the taxpayer's claims were now moot. But in *U.S. v. Friedman* 532 F2d 928 (1978) the Court ruled that the fact papers were turned over pursuant to the summons is not in itself mootness. When one contrasts these decisions with the analysis in the *Uyeda* decision, it becomes greatly apparent the difference in the Federal Circuit Court's approach to taxpayer problems as compared to others on the issue of mootness. In the case of *Sibron vs. New York,* 392 US 40, 20 L Ed 2d 917, 88 S Ct (1978), the Court noted it was "of vital importance of keeping open the avenues of judicial review of deprivation of a Constitutional right." Although *Sibron* dealt with a criminal case, still the principle of keeping judicial review open is implicit in the right of appeal and works against the doctrine of mootness.

Similarly, this is the type of case which is "capable of repetition, yet evading review", which is the often quoted case of *Southern Pacific Terminal Company vs. ICC,* 219 US 498 (1911). This difficulty of repetition and evading review was not overlooked in the *Sibron* case. The court noted that *Sibron* had no opportunity to bring his case for review prior to the ending of his criminal sentence. Similarly, a litigant in a civil case, can become completely frustrated in his right of review and can never gain review by the simple expediency of the District Court refusing to grant a stay order. Because the Federal government can force the issue before appeal can be processed, the right of review becomes circumvented. In the area of mootness, it seems there are two standards; one which applies the enforcement of summons against taxpayers, and that which applies in other

areas of the law. See *Sibron v. New York,* Supra. and *Uyeda vs. Brooks,* Supra for example.

II.

Proceedings for enforcement of Summons and pursuant to 26 USC, Sec. 7402(b) and 7604(a) has never been construed to the Petitioner's knowledge to preclude the opportunity to present evidence, submit argument and consider the Petitioner's pleadings and affidavits. However, close examination of the record in this case shows that at the hearing for the Order to Show Cause and the enforcement of the Summons, this Petitioner was given no opportunity to be heard or submit argument. This occurred, despite the fact that there were affidavits in direct contradiction to the testimony of the Internal Revenue Agent who was testifying. At the conclusion of the testimony of the agent, the Court announced its decision and immediately ruled adversely. In any hearing, the opportunity to be heard and to submit argument is never to be denied, as such violates the basic precepts of due process, *Reynolds v Cochran,* 365 US 525, 5 L Ed 2d 754, 81 S Ct 723.

This substantial deviation from the forms and practices of the court system makes it incumbent upon this Court to correct and supervise the lower court system. It does violence to the legislative intent to require an Order to Show Cause before enforcing the Summons, but not allow an opportunity to be heard. This issue is hardly one that is destroyed on the grounds of mootness, as suggested by the Circuit Court.

Your Petitioner submits that the very essence of due process is the right of counsel, right to submit testimony and the right to make argument and submit issues to the Court and is fundamental to the Fifth Amendment to the Constitution of the United States.

III.

The Court, in addition to denying the opportunity to be heard and present testimony, supplied itself the magic words that were necessary for the Summons enforcement thus precluding effective cross-examination by the Petitioner to establish the real motivation was criminal rather than civil. The Court commenced asking leading questions which parroted the words necessary for statutory enforcement of the Summons. After the special agent testified, the Court, then, commences: "Q. Was the purpose of the issuance of this Subpoena to use it under the guise of the civil process to require this information for the actual purpose of criminal prosecution?" There is no question as to what the agent's answer is going to be. He is obviously going to say "no" which is what he did. The Court then follows and says, "Have any steps been taken by the IRS to begin criminal process or whereby recommendations for criminal prosecution has begun?" This Petitioner has been effectively denied relief and an opportunity to show cause why the Summons should not be issued. The District Court in taking over the questioning, trying to supply the magic words, precluded the taxpayer examination into the tests as required by *US v. LaSalle National Bank*, _____US_____, 57 L Ed 2d 221 (1978). In that case of US v. LaSalle National Bank, inquiry into the special agent's purpose in issuing the Summons conducting the investigation has become irrelevant. The Supreme Court has directed that the proper inquiry as to whether or not Internal Revenue Service as an institution has a legitimate civil purpose for investigation. By the Court's inquiry and examination there is little that the Petitioner can do to cause the agent to recant this Court-led testimony. Moreover, there was no testimony about the Internal Revenue Service as an institution in the proceedings below, only testimony of the personal motives of the special agent. Any attempt by the petitioner-taxpayer to amplify the record was effectively denied by the District Court failure to grant an

opportunity to the taxpayer to present evidence on their own part or to make appropriate argument over the lack of evidence in the government's case.

The petitioners limited opportunities in the District Court still raise substantial doubts regarding the existence of a legitimate civil purpose on the part of the Internal Revenue Service as an institution. The agent was evasive, contradictory, and secretive about his record needs. The government was consistently reluctant to show any purpose in requiring the records which acts could justify a claim of bad faith pursuant to the standards of *United States v Powell*, 379 US 48, 13 L Ed 2d 112, 85 S Ct 248 (1968). The petitioner submits that it is improper to allow the District Courts to continue to enforce these summons merely upon the special agent's allegation of an existence of a civil aspect to the investigation, without providing the taxpayer with an effective opportunity to challenge the propriety of the Internal Revenue Services' institutional purpose is a matter of due process of law, guaranteed to him and impliedly recognized in *US v LaSalle National Bank*, supra.

Your petitioner established that the agent had two purposes in requesting the tax information, one to determine a need for criminal action and the other to determine if a tax return was required to be filed. It was established that a return was required as the petitioners attorney told that to the agent and secondly what the probable amount due and the amount of withholding presently paid towards that tax. Therefore since the civil purpose no longer existed as the agent had that information, all that was left was the criminal purpose. Why else talk to the supervisor about criminal prosecution. Of course, the agent was careful not to make a decision prior to the hearing.

IV.

Your Appellant submits that the records being sought were being held by an unenforced summons. The govern-

ment issued one summons to hold the record, but took no steps to enforce that summons, thus creating a freeze upon the records. A demand had been made by the taxpayer on the Accountant for the records prior to October 25, the date that this Summons and Subpoena was being enforced. Thus, the records should properly be in the hands of the taxpayer not subject to these proceedings. The District Court permitted a different procedure. A summons was used to freeze documents in the hands of third persons and then followed with another Summons and later Subpoena enforcement based on the last Summons. This is not the procedure outlined by Congress in enforcement. The Summons may not be used to seize the records and then commence difference proceedings to remove them from the accountant in an effort to thwart the taxpayer from getting all of his records from the accountant. There is not provision in the statute for a freeze. The statute is designed to provide prompt enforcement within due process guidelines. The history of the act shows a concern toward due process requirements.

Your Petitioner submits that the government may not use the Summons as some form of an injunction on the records. The procedure for requesting injunctions is outlined in the Federal Rules of Civil Procedures and the statutes, section 26 USC section 7402(b) and 7604(a), and do not permit or allow restraining orders as an adjunct of the Summons procedure. The sanctioning of a new, heretofore unknown procedure in Summons enforcement deprives this Petitioner of the protection which Congress intended he enjoy with the statute and the Constitution of the United States. This is further departure from the accepted and usual judicial proceedings which should call for an exercise of this Court's considered opinion.

In summary, your Petitioner claims that a dismissal of an Appeal for mootness because of the failure of a court to enter a Stay Order denies the Petitioner of their day in court. Secondly, the standards for deciding mootness are not

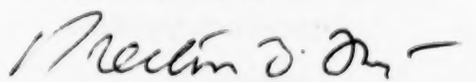
uniform in the circuits. Thirdly, Petitioner was never given an opportunity to present evidence or make argument in Court. The District Court, however, was allowed to examine the agent for missing words necessary for the government's case foreclosing effective cross-examination. Fourthly, the Petitioner was granted to establish that the Internal Revenue Service's motives as an institution is controlling and not that of the agents in deciding the issue of criminal versus civil motives. Lastly, the freezing of taxpayer's records in the hands of third persons while enforcing other Summons to keep the taxpayer from retrieving his records is a denial of due process rights.

CONCLUSION

Your Petitioner respectively requests that a Writ of Certiorari should issue to review the Judgment and Orders of the Ninth Circuit.

DATED this 17th day of November, 1978.

Respectfully Submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
and CURTIS G. GUILES, Special
Agent, Internal Revenue Service,
Petitioners

vs.

O'BRIEN, SIMMONS and COMPANY,
Respondent,

ORDER

and

BEN R. DRAKE and JENNY
DRAKE, Husband and Wife.
Intervenors-Appellant

Before: HUFSTEDLER and WRIGHT, *Circuit Judges.*

Upon due consideration, appellees' motion to dismiss this appeal as moot is granted and the motion for enlargment of time is denied as moot.

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA
and CURTIS G. GUILES, Special
Agent, Internal Revenue Service,
Petitioners,

v.

ORDER

O'BRIEN, SIMMONS & COMPANY,
Respondent.

ORDER TO ENFORCE
INTERNAL REVENUE SERVICE SUMMONS

The above-entitled matter having come on for hearing in this court on February 3, 1978, on the Order to Show Cause entered by this Court on January 18, 1978, with each of the parties thereto being represented by their respective counsel, this Court having considered the pleadings, the

testimony and evidence introduced at the hearing, and being otherwise fully advised in the premises thereof,

HEREBY ORDERS that the respondent, O'Brien, Simmons and Company, shall appear before Curtis G. Guiles at Room 325, 550 W. Fort Street, Boise, Idaho, on February 10th, 1978, at 10:00 a.m., and produce for examination and/or photostatic copying or other mechanical means of reproduction all retained copies and work copies of individual, partnership, and/or corporate federal income tax returns or employment tax returns for Ben R. Drake or Jenny Drake as individuals or jointly as Ben R. Drake and Jenny Drake, for the years 1974, 1975, and 1976.

The examination shall continue from day to day until completed.

In lieu of this appearance the respondents may deliver clear and legible copies of the above-described documents to Special Agent Guiles, prior to the date set for their appearance.

IT IS FURTHER ORDERED that the respondent, O'Brien, Simmons and Company, by such partners or employees who can testify with respect to the records produced pursuant to this order, shall appear before Special Agent Guiles at a time and place to be agreed upon mutually for the purpose of giving testimony concerning the tax liability of Ben R. Drake for the year 1976.

In the event Special Agent Guiles and the respondent cannot agree mutually upon a time and place, then the respondent, O'Brien, Simmons and Company, through its designated partner or employee, is ordered to appear at the office of Special Agent Guiles located at Room 325, U.S. Federal Building and Courthouse, 550 W. Fort Street, Boise, Idaho, at a time designated by Special Agent Guiles; notice of said time and place will be given to the respondent, O'Brien, Simmons and Company, by Special Agent Guiles by means of a letter sent by certified mail to their last known business address at least ten (10) days prior to the date set by Special Agent Guiles.

Dated this 3rd day of February, 1978.

/s/ _____
Ray McNichols
United States District Court

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
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Agent, Internal Revenue Service,
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v.

O'BRIEN, SIMMONS and
COMPANY,
Respondent,

and

BEN R. DRAKE and JENNY
DRAKE, husband and wife,
Petitioners.

AFFIDAVIT OF SERVICE

STATE OF IDAHO)
County of Ada) ss.

PRESTON G. LUTZ, being first duly sworn, deposes and states that on this 18th day of November, 1978, three copies of the Writ of Certiorari were mailed postage prepaid to the designated counsel for the respondents:

Jeffrey W. Ring
Assistant U.S. Attorney
District of Idaho
550 W. Fort, Box 037
Boise, Idaho 83701

and upon

Mitchell B. Dubick
Trial Attorney, Tax Division
Department of Justice
Washington, D.C. 20530

I FURTHER CERTIFY that all parties required to be served have been served.

/s/ _____
Preston G. Lutz
Counsel for Appellant-Petitioner

SUBSCRIBED AND SWORN TO before me this 18th day of November, 1978.

/s/ _____
Notary Public
Residence: Boise, Idaho